U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29277225

Date: JAN. 17, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, an artist specializing in Chinese painting and calligraphy, seeks first-preference immigrant classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act), section 203(b)(1)(a), 8 U.S.C. § 1101(b)(1)(a). This classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the record established the Petitioner met the initial evidentiary requirements for this classification, he did not demonstrate, as required, that he has sustained national or international acclaim and is among the small percentage at the very top of his field. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to noncitizens with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. The noncitizen must seek to enter the United States to continue work in the area of extraordinary ability and show that their entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a

major, internationally recognized award). If a petitioner does not submit this evidence, then they must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and commercial successes).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

According to his personal profile submitted with the petition, the Petitioner is "a graduate of the [redacted] and a well-known contemporary Sinologist, Painter, Calligrapher and Philanthropist." He initially claimed extraordinary ability as both a scholar in contemporary Confucianism and as an artist specializing in Chinese painting and calligraphy. He clarified in response to a request for evidence (RFE) that he intends to continue his work as an artist in the United States; therefore, the Director evaluated evidence related to the Petitioner's accomplishments as an artist.

Because the Petitioner has not indicated or established that he received a major, internationally recognized award, he is required to satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director concluded that the Petitioner met four criteria by establishing that he received nationally recognized awards, participated as a judge of the work of others in the same field, displayed his work at artistic exhibitions, and commanded significantly high remuneration in relation to others in his field. *See* 8 C.F.R. § 204.5(h)(3)(i), (iv), (vii) and (ix). Although the Petitioner also claimed he could satisfy the criteria relating to published materials in professional publications or major media, memberships in associations that require outstanding achievements, and original contributions of major significance in the field, the Director concluded that he did not meet those criteria.

Because the Petitioner demonstrated that he met the initial evidence requirements, the Director proceeded to a final merits determination. In a final merits determination, U.S. Citizenship and Immigration Services (USCIS) must analyze all of a petitioner's accomplishments and weigh the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. In this matter, the Director determined that the Petitioner did not demonstrate he meets this very high standard.

On appeal, the Petitioner contends that the Director did not correctly apply the two-part adjudicative approach required by *Kazarian* because they failed to consider all the submitted evidence together in the final merits determination. Specifically, he emphasizes that "USCIS did not discuss any of the

content in the Petitioner's multiple recommendation letters issued by experts in the same field," noting that such letters "clearly explained how Petitioner has sustained national acclaim." The Petitioner maintains that the Director's decision, because it "did not consider the totality of the evidence," did not sufficiently address why he did not establish his eligibility for the requested classification.

The Petitioner also generally objects to the two-part adjudicative approach set forth in *Kazarian* and asserts that USCIS "improperly adopted" it. The Petitioner specifically highlights a pre-*Kazarian* U.S. district court decision, *Buletini v. INS*, 850 F. Supp. 1222 (E.D. Mich. 1994), which states that "[o]nce it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability unless [USCIS] sets forth specific and substantiated reasons for its finding that the alien does not have extraordinary ability."

We note, however, that in contrast to the broad precedential authority of the case law of a United States circuit court (such as with *Kazarian*), USCIS is not bound to follow the published decisions of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district court's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.[1] The Petitioner's assertion that USCIS should rely on *Buletini* and other pre-*Kazarian* federal district court decisions rather than *Kazarian* and binding USCIS policy guidance is not persuasive.

However, we agree with the Petitioner's claim that the Director's final merits analysis does not reflect their consideration of the totality of the evidence as required. Although the Petitioner submitted evidence relating to at least seven of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), the final merits discussion addresses evidence related to only four of those criteria, rather than considering the evidence in its totality. Specifically, the Director's final merits analysis did not address the evidence relating to the Petitioner's memberships in associations, published materials about him, and contributions to his field and whether that evidence, individually or collectively, shows sustained national or international acclaim and demonstrates that he is among the small percentage at the very top of the field of endeavor. Further, as noted by the Petitioner, the record contains several letters from experts in his field which specifically address not only his contributions to the field, but also provide the authors' opinions regarding his recognition and stature in the field and are therefore relevant to the final merits determination.

Because the Director did not properly consider all the Petitioner's evidence in the final merits analysis, the decision did not sufficiently address why he did not demonstrate his eligibility for the requested classification. *See generally* 6 *USCIS Policy Manual* F.2(B)(2), https://www.uscis.gov/policy-manual (stating that in the final merits determination, USCIS officers should evaluate all the evidence together when considering the petition in its entirety to determine if a petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

[1] Regardless, the *Buletini* decision does not clearly conflict with the *Kazarian* court's characterization of the adjudication process as including a final merits determination. The *Buletini* opinion indicates that the court considered the possibility that a petitioner can submit evidence satisfying three criteria and still not meet the extraordinary ability standard if USCIS provides specific and substantiated reasoning for its conclusion. *See Buletini*, 860 F. Supp. at 1234. The court in *Buletini* did not reject the concept of examining the quality of the evidence presented to determine whether it establishes a petitioner's eligibility for this immigrant visa classification.

When denying a petition, the Director must explain in writing the specific reasons for denial. 8 C.F.R. § 103.3(a)(1)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g., Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not satisfy this requirement.

Accordingly, we will withdraw the Director's decision and remand the matter for further review and entry of a new decision. The new decision should include an analysis of the totality of the record, including the evidence submitted in support of all claimed initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Further, in conducting routine checks to verify the information submitted with the petition, we consulted Department of State (DOS) records relating to the Petitioner's prior visa applications. Those records indicate that the Petitioner provided information regarding his education and employment history on a Form DS-160, Online Nonimmigrant Visa Application, which appears to be inconsistent with claims made in support of the instant petition. As noted, the evidence submitted with the petition indicates that the Petitioner graduated from the [redacted] The submitted personal profile describes him as a well-known scholar and artist, and the creator of "Contemporary Confucianism in the field of Sinology." The Petitioner indicated in his concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, that he has been self-employed as an artist, painter, and author since 2011 and lists no other employment. However, on the Form DS-160 submitted in May 2015, the Petitioner stated that he was then currently employed in "business" and responsible for the management of a Chinese company located in Beijing, having previously worked as the general manager of a thermoelectrical materials company. He also indicated that he was a graduate of [redacted] and listed no other education.

The Director has not reviewed this potentially derogatory information and its relevance to the Petitioner's eligibility for the requested classification. Therefore, we find that further review of the record is warranted for this additional reason. If the Director finds the information from DOS records material to the Petitioner's eligibility, they must notify him of this information through an RFE or notice of intent to deny and allow an opportunity for explanation and rebuttal pursuant to 8 C.F.R. § 103.2(b)(16)(i) before issuance of a new decision. If a petitioner is unable to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies, USCIS may evaluate the reliability and sufficient of other evidence submitted in support of the immigration benefit. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.